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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROGELIO A. QUINTERO Defendant and Appellant.	H041447 (Santa Clara County Super. Ct. No. C1477374)

A jury found appellant Rogelio A. Quintero guilty of two counts of unlawful sexual intercourse with a minor where the defendant is age 21 years or older. (Pen. Code, § 261.5, subd. (d).)[1] On September 10, 2014, the court suspended imposition of sentence and granted appellant probation for five years on various terms and conditions. Subsequently, appellant filed a timely notice of appeal.

On appeal, appellant contends that the trial court erred in admitting impeachment evidence of two prior misdemeanor convictions that he suffered—one for battery on a spouse or cohabitant (§ 243, subd. (e)(1)), and one for criminal threats (§ 422). He argues that battery on a spouse or cohabitant is not a crime of moral turpitude and both misdemeanors should have been excluded because they were remote in time and had little bearing on his credibility. In addition, appellant argues that the trial court's imposition of sex offender registration (§§ 290, 290.006) was an abuse of discretion because the circumstances do not indicate that he will reoffend. For reasons that follow, we disagree

[1] All further statutory references are to the Penal Code unless otherwise indicated.

that the court erred in admitting evidence of appellant's prior misdemeanor convictions. However, we must remand this case to the trial court because in imposing the sex offender registration requirement, the court retained jurisdiction to modify the requirement. As we shall explain, the trial court lacks authority to impose temporary registration under sections 290 and 290.006.

Facts

In August 2013, Jane Doe was 14 years old.[2] Around that time, she met appellant through Facebook. They exchanged messages and Jane gave appellant her cellular telephone number. Jane testified that she told appellant she was 14 years old. Appellant, who was 23 years old at the time, told Jane not to "snitch on [him]" or he would get in trouble.

Jane and appellant spoke on the telephone "a little bit" and they exchanged text messages. At one point, they made plans to meet at the Eastridge Mall in San Jose. Jane traveled alone to the mall by bus. She met appellant and they went to the park, along with appellant's friend Rashon. At the park, the three of them "just hung out."

Sometime before her 15th birthday, Jane went to appellant's house. She was with appellant and Rashon in appellant's room. Appellant and Rashon drank "a little bit," and the three of them smoked marijuana. Eventually, Rashon fell asleep on the floor. Jane and appellant were still awake. They were on appellant's bed. With Rashon still in the room, appellant removed Jane's bra and underwear. Then, appellant removed his pants and asked Jane to orally copulate him. When she refused, he put his penis in her vagina and they had sex. Appellant did not use a condom. They fell asleep, and Jane took the bus home the next morning.

[2] We refer to the victim in this case as Jane Doe to protect her anonymity. For ease of reading we refer to her as Jane.

A few weeks after her birthday, Jane again took the bus to go to see appellant. They smoked marijuana at appellant's house in his room. Appellant removed Jane's bra, pants, and underwear. Jane did not say anything. Appellant asked Jane to orally copulate him and this time she did—"a little." Afterward they had sex on the bed. Again, appellant did not wear a condom. Jane took the bus home.

Jane and appellant met again on February 22, 2014. Jane was home alone that day and invited appellant to come over. She and appellant texted while he was en route to her apartment. Appellant sent Jane several text messages that were sexual in nature, including "LOL Ima rape u," "will you support the room so I can go inside u," and "Im sooo horny!!!" Appellant sent Jane another text message asking, "you think you can handle me?," followed by another that said, "I hope so LOL. Well then again u did b4." Jane texted in response, "LOL maybee." A record of their text messages was admitted at trial.

Jane met appellant at the bus stop and they went back to her apartment. Later, they went outside, where one of Jane's neighbors confronted appellant. Appellant and the neighbor were "yelling" at each other until appellant walked away. Appellant went to a nearby park and Jane went to the side of the apartment building. Jane and appellant texted each other and agreed to meet again. As Jane was heading back to her apartment to get wine for appellant, she encountered Santa Clara Police Officer Bryan Williams coming down the stairs that led to her apartment. Jane said she was "scared" and "nervous." She told the officer that the "man" who had been there left. She did not want appellant to get in trouble. Officer Williams called Jane's mother using Jane's cellular telephone. On Jane's telephone, he found the text messages between Jane and appellant and photographs of appellant. Officer Williams asked Jane about the text messages. She confirmed they were messages between her and appellant, but she denied having had sex with him. She did not want to tell the police that she had had sex with appellant "because

he's old." Eventually, however, she admitted that they had had sex. It was the first time she told anyone about their sexual relationship.

As Officer Williams was looking at Jane's telephone, Jane received a text message from appellant. Officer Williams sent appellant a response from Jane's telephone that read, " 'I want to see you. Where are you?' " Officer Williams went to the bus stop where appellant was waiting. He asked appellant if he could look at his cellular telephone, and appellant gave it to him. Officer Williams compared the text conversation on Jane's telephone to the corresponding conversation on appellant's telephone and noticed that some of the messages had been deleted from appellant's phone. Through the use of Cellebrite technology, it was discovered that appellant had deleted 126 text messages between him and Jane, including the ones that were sexual in nature.

Appellant testified in his own defense that he knew Jane "as a friend." It was his friend Rashon who had discovered Jane's Facebook page and showed it to him. According to appellant, the page displayed the month and day of Jane's birth, but not the year. The page showed that she had "graduated" in 2012, but did not state from where. The pictures and comments posted on the page gave appellant the impression that Jane was at least 18 years old.

Rashon obtained Jane's telephone number and gave it to appellant, even though appellant did not ask for it. Appellant saved Jane's telephone number "because she was a female." He started texting Jane, but did not ask her how old she was. Jane never volunteered her age, even when appellant told her he was 23 years old.

After two or three weeks of communicating via text messages, appellant and Jane decided to meet in person at the Eastridge mall. Appellant testified that when he first saw Jane, she looked "like a teenager" and he admitted that she appeared underage. Nevertheless, he invited Jane to go with him to the park that day. He did not have sex with her or even kiss her.

Jane went to appellant's house in San Jose "a couple of times" and spent the night "once." Appellant "always" had friends visiting or spending the night. The day that Jane spent the night, it was Rashon that asked appellant if Jane could come over. Appellant, Rashon, and Jane went to a 7-Eleven to get beer. At appellant's house, Rashon asked appellant to "roll a joint of marijuana." Appellant agreed. He said that he was "not much of a smoker," but eventually he did smoke the marijuana along with Rashon and Jane.

Jane spent the night because appellant "thought it would be wrong" to have her go home. It was late and he lived in a bad part of San Jose. Jane slept on the bed while he slept on the couch. They did not have sex. Appellant went to Jane's apartment on at least two occasions. The first time he went, Rashon went with him. Appellant brought two bottles of alcohol and Rashon brought marijuana. Jane, appellant, and Rashon "just hung out" at the apartment. When the boyfriend of Jane's mother returned later that evening, the alcohol and marijuana were in plain sight. The boyfriend said nothing to appellant or Rashon about Jane's age. Later, several police officers arrived and told appellant and Rashon to leave because they were disturbing the boyfriend. According to appellant, the officers never said anything to him about Jane's age.

Appellant went to Jane's house on February 22, 2014. At the time, he was dating a woman named Nicole. Appellant said that Jane had met Nicole earlier when he and Nicole were on a double date with Jane and Rashon. That day, appellant and Nicole got into a fight over Nicole's infidelity. Appellant "was pissed" and asked Jane if he could come over to see her. Appellant explained that he sent Jane sexual text messages because he anticipated Nicole would "check the phone later" and go through the messages. Appellant said that he wanted to make Nicole jealous by implying that he had had sex with Jane. Appellant and Jane had a joking relationship, and he knew Jane "was going to go along" with the text messages.

Appellant said that he arrived at Jane's apartment at 3:00 or 4:00 p.m. He ate and Jane told him to help himself to her parents' wine. When appellant went outside to

smoke a cigarette, Jane's downstairs neighbors, a man and a woman, confronted him. The man and the woman told appellant that Jane was a minor and the woman called the police. At first, appellant did not believe what they were saying. However, when the man told him again that Jane was underage, appellant said that he "freaked out" and left. Later, he remembered that he had left some wine inside Jane's apartment. He texted Jane to bring him the wine so that the police would not think he was giving her alcohol. He did not plan to confront Jane about her age, but was "going to stop talking to her after that . . . ."

Appellant explained that he deleted his text messages with Jane because he was worried that the police would "incarcerate" him for smoking marijuana and drinking alcohol with a minor. He deleted all his messages by selecting the "delete all" option on his telephone. Appellant said that he knew the text messages appeared incriminating. They painted "an ugly picture" of him "attempting to have sex with [Jane]."

Subsequently, appellant was interviewed by two police officers at the police station. He said that he felt "very uncomfortable" and "freaked out" during the interview. He lied in response to several of the officers' questions because he "thought it would look better on [his] part" and because he "wanted to get out of there." However, when the officers asked him whether he had had sex with Jane, he responded truthfully, "No." Appellant testified that he never had sex with Jane.

Discussion

Admission of Evidence of Appellant's Prior Misdemeanor Convictions

In limine, the prosecutor filed a motion requesting permission to impeach appellant's testimony with several of his prior misdemeanor convictions, including a 2011 conviction for domestic battery (§§ 242, 243, subd. (e)(1)), a 2011 conviction for criminal threats (§ 422), and a 2012 conviction for vandalism (§ 594, subds. (a) & (b)(1)).

In response, defense counsel filed a motion to exclude reference to "any prior conviction which [appellant] has suffered." In her supporting argument, defense counsel

stated that "the courts have determined" that domestic battery qualifies as a crime of moral turpitude, but argued that appellant's conviction for that offense should nevertheless be excluded under Evidence Code section 352. Defense counsel did not address appellant's conviction for criminal threats in her argument.

The trial court deferred ruling on the parties' motions, and the evidentiary phase of appellant's trial commenced on July 31, 2014, with Jane's testimony.

On the morning of August 6, 2014, during the second day of the evidentiary portion of the trial, appellant took the stand. During his direct examination, defense counsel asked appellant if he had been convicted of domestic battery and criminal threats misdemeanor charges. Appellant confirmed that he had.[3]

Later, during a break in appellant's testimony, the court summarized an earlier ruling for the record. The court explained there had been a discussion with the attorneys at sidebar and the court had ruled that the "simple fact of the convictions that 273.5 [*sic*] and the 422 would be admitted, not the 594, and not any juvenile conduct. That also would not be admitted." The court went on to say that it had "weighed the *Castro* factors.[4] The court explained its reasoning as follows. "First of all, the convictions happened fairly recently, so I do not find them to be remote. [¶] I don't find that there is any chilling effect on [appellant's] testifying. Those conditions are sufficiently dissimilar to the current charge. I indicate that there wouldn't be any chilling effect on [appellant's] testifying. They are also misdemeanors. And so I don't find that there would be any undue prejudice for [appellant's] testifying in that regard."[5]

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[3] This was the only time that the prior convictions were mentioned during the trial.

[4] *People v. Castro* (1985) 38 Cal.3d 301 (*Castro*).

[5] In determining whether to admit evidence of prior convictions for impeachment, the trial court should consider four factors: (1) whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant (continued)

The next day, the court revisited the issue of the prior convictions in order to make a complete record. The court stated the following. "As far as the *Castro* analysis that the court employed, I do want to indicate that I did consider whether the 422 and the 243(e)(1) convictions involve moral turpitude." The court noted that the prosecution had not cited any case concerning whether domestic battery (§ 243, subd. (e)(1)) is a crime involving moral turpitude. The court said that it was not aware of any specific case that addressed the issue. However, the court reasoned, "But I do find in this case that the crime does involve moral turpitude. The reason for that is I compare the 243(e)(1) conviction to a 273.5 conviction [corporal injury on a spouse/cohabitant], and there are cases that do indicate 273.5 conviction involves moral turpitude. [¶] The difference between a 273.5 and a 243(e)(1) is the infliction of a traumatic injury. And so really in the cases that talk about a 273.5 involving moral turpitude, and cases like a simple battery not involving moral turpitude. [¶] The question is really is it a traumatic condition that has caused courts to conclude that a 273.5 involves moral turpitude? Or is it the relationship between the parties that has caused cases to conclude that? And there are decisions that talk about this in dicta that talk about this issue in various ways. And I'm familiar with those cases. [¶] I do find in this case that it's the nature of the relationship in the 243(e)(1) that would involve—would bring this misdemeanor conviction into the realm of cases that involve moral turpitude. [¶] Part of that is—part of the reason for the court's analysis is I compared the 243(e) where there is a relationship. In other words, a prior cohabitant or someone with whom the defendant had a dating relationship to other cases that involve moral turpitude. [¶] For example, battery on an inmate. There is a relationship between the parties. Battery by an inmate. There's a specified statutory

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does not testify out of fear of being prejudiced because of impeachment by prior convictions. These factors are outlined in *People v. Beagle* (1972) 6 Cal.3d 441, 453, abrogated on other grounds as stated in *People v. Diaz* (2015) 60 Cal.4th 1176.

relationship between the parties. Battery on a police officer. A relationship between the parties, those cases have all construed that there is moral turpitude. [¶] But by contrast, battery with serious bodily injury has been held by at least one court to not involve moral turpitude. [¶] So for that reason I find that it's not the traumatic injury that brings it necessarily into that realm, though it could in the case of domestic violence. It's the fact of the relationship. And so that's the reason that I do find that the crime involves moral turpitude."

The court added that it had admitted the two prior convictions after weighing the relevant factors and conducting an Evidence Code section "352 balancing" analysis.

Appellant contends the trial court erred in admitting evidence of his prior misdemeanor convictions for domestic battery and criminal threats. He argues that the battery conviction was not a crime of moral turpitude and that both convictions were "highly prejudicial" and minimally probative, requiring their exclusion under Evidence Code section 352. Further, he contends that his trial counsel was ineffective for conceding that domestic battery was a crime of moral turpitude and for failing to specifically object to the admission of his criminal threats conviction.

We point out that appellant did not object on the basis that domestic battery was not a crime of moral turpitude at trial. In fact, his counsel conceded that it was. "[B]efore an appellate court will give consideration to an objection to evidence, the *specific ground* for its exclusion must have been clearly stated to the trial court." (*People v. Dorsey* (1974) 43 Cal.App.3d 953, 960, citing Evid. Code, § 353, subd. (a).) Since appellant did not argue in the trial court that his domestic battery conviction could not be used for impeachment because the crime of domestic battery does not involve moral turpitude, he cannot raise that argument for the first time on appeal. Due to defense counsel's concession that domestic battery is a crime of moral turpitude, appellant has forfeited his right to challenge on appeal the trial court's conclusion that misdemeanor

domestic battery is a crime involving moral turpitude that may be used for impeachment. (See Evid. Code, § 353, subd. (a).)

In the alternative, appellant claims his counsel was ineffective because she did not object on the basis that domestic battery is not a crime involving moral turpitude and in fact conceded that it was. For reasons we shall explain, we do not find that counsel was ineffective in conceding that domestic battery is a crime of moral turpitude.

At the outset we note that evidence of past misconduct amounting to a misdemeanor and involving moral turpitude is admissible to impeach a witness in a criminal case, subject to exclusion under Evidence Code section 352. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296 (*Wheeler*).) Offenses involving moral turpitude include those in which dishonesty is an element and those evincing a " 'general readiness to do evil.' " (*Castro, supra*, 38 Cal.3d at pp. 306, 315.) Such convictions are relevant to a witness's credibility because a person who has committed a crime of moral turpitude "is more likely to be dishonest than a witness about whom no such thing is known." (*Id*. at p. 315; see also *Wheeler*, *supra*, at p. 295 [misconduct involving moral turpitude may suggest a willingness to lie].) Hence, if a readiness to do evil "can reasonably be inferred from the elements of the offense," the prior conviction is admissible for impeachment purposes. (*People v. White* (1992) 4 Cal.App.4th 1299, 1303.)

In determining whether a prior crime involves moral turpitude, the court must determine that "the least adjudicated elements of the conviction necessarily involve moral turpitude." (*Castro, supra*, 38 Cal.3d at p. 317.) "The 'least adjudicated elements' test means that 'from the elements of the offense alone—without regard to the facts of the particular violation—one can reasonably infer the presence of moral turpitude.' [Citations.]" (*People v. Feaster* (2002) 102 Cal.App.4th 1084, 1091.)

"A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) A violation of section 243, subdivision (e) (1), requires proof that the defendant committed a battery against "a spouse, a person with whom the defendant is

cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship." (§ 243, subd. (e)(1).) The question of whether a violation of section 243, subdivision (e)(1), constitutes a crime of moral turpitude for purposes of impeaching a witness has not been addressed by the Courts of Appeal in any published decision.

In *People v. Mansfield* (1988) 200 Cal.App.3d 82 (*Mansfield*), the Court of Appeal held that a simple battery (§ 242) does not necessarily show readiness to do evil or necessarily involve moral turpitude. (*Mansfield, supra*, at p. 88.) The *Mansfield* court explained that " 'A *battery* is any willful and unlawful use of force or violence upon the person of another.' [Citation.] The word 'violence' has no real significance. 'It has long been established, both in tort and criminal law, that "the least touching" may constitute battery. In other words, *force* against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.' [Citations.] A person need not have an intent to injure to commit a battery. He only needs to intend to commit the act. [Citation.] Thus, a simple battery does not necessarily show readiness to do evil or necessarily involve moral turpitude." (*Id*. at pp. 87-88.)

Nonetheless, in *People v. Rodriguez* (1992) 5 Cal.App.4th 1398 (*Rodriguez*), this court held that a violation of section 273.5 is an offense involving moral turpitude. "To violate Penal Code section 273.5 the assailant must, at the very least, have set out, successfully, to injure a person of the opposite sex in a special relationship for which society rationally demands, and the victim may reasonably expect, stability and safety, and in which the victim, for these reasons among others, may be especially vulnerable. To have joined in, and thus necessarily to be aware of, that special relationship, and then to violate it willfully and with intent to injure, necessarily connotes the general readiness to do evil that has been held to define moral turpitude." (*Rodriguez, supra*, at p. 1402.)

This court's conclusion in *Rodriguez* did not turn on the infliction of injury required by section 273.5, which may be "of a minor or serious nature" (§ 273.5, subd. (d)), but rather on the "requisite animus" of the perpetrator, i.e., his "knowledge of circumstances and a conscious decision to exploit them sufficient to signify readiness to do evil[.]" (*Rodriguez, supra*, 5 Cal.App.4th at p. 1402.) It is the assailant's exploitation of a "special relationship" with the vulnerable victim that makes the conduct proscribed by section 273.5 into a crime of moral turpitude. (*Rodriguez, supra*, at p. 1402.)

This court's holding in *Rodriguez* applies with equal force to domestic battery. It requires that a defendant commit a battery against "a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship." (§ 243, subd. (e)(1).) Similar to the crime of inflicting corporal injury on a spouse, domestic battery is a domestic violence crime involving the defendant's exploitation of a "special relationship" with the victim. (*Rodriguez, supra*, 5 Cal.App.4th at p. 1402.)[6] It is the nature of the relationship

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[6] Appellant argues to the contrary, stating that this court's decision in *Rodriguez* was "wrongly decided" and based on a "flawed analysis." In support of his position, he relies on two federal immigration cases from the Ninth Circuit Court of Appeals—*Morales-Garcia v. Holder* (9th Cir. 2009) 567 F.3d 1058 (*Morales-Garcia*) and *Galeana-Mendoza v. Gonzales* (9th Cir. 2006) 465 F.3d 1054 (*Galeana-Mendoza*). We note that this court is not bound by the decisions of lower federal courts. (*People v. Avena* (1996) 13 Cal.4th 394, 431.) Nor do we find these decisions persuasive where, as here, they do not address the issue at hand. (See *People v. Brown* (2012) 54 Cal.4th 314, 330 [cases are not authority for propositions not therein considered].) In *Morales-Garcia*, the court concluded that section 273.5, subdivision (a), was not "categorically" a crime involving moral turpitude under the federal Immigration and Nationality Act (INA). (*Morales-Garcia, supra*, at p. 1060.) The *Galeana-Mendoza* court found the same was true for section 243, subdivision (e)(1). (*Galeana-Mendoza, supra*, at p. 1055.) The decisions are inapposite. As the Ninth Circuit Court of Appeals has explained, whether a crime is a crime of moral turpitude for purposes of California evidence law is a "very different issue" from whether a crime is a crime of moral turpitude for federal immigration purposes. (*Castrijon-Garcia v. Holder* (9th Cir. 2013) (continued)

involved in a domestic battery that brings the crime into the realm of cases that involve moral turpitude.

Our conclusion is supported by another case. The court in *People v. Lindsay* (1989) 209 Cal.App.3d 849 (*Lindsay*) held that battery against a peace officer (former § 243, subd. (c)) is a crime of moral turpitude, even though it, too, required only the "least touching." (*Lindsay*, *supra*, at pp. 854-858.) The *Lindsay* court distinguished *Mansfield*, stating: "Battery upon a peace officer involves elements in addition to those necessary for a conviction of simple battery, or battery which causes serious injury: the willful and unlawful use of force must be: (1) upon a peace officer in the performance of his or her duties; and (2) the person committing the battery must know or reasonably should have known the victim of the battery was a peace officer. The latter element clearly involves a different mental state than that in *Mansfield.* Here, the act must likewise have been intended, but in addition the perpetrator must have known, or should have known, the victim was a peace officer in the performance of his or her duties." (*Id*. at p. 857.)

The *Lindsay* court concluded there could be "no doubt the intentional, willful and unlawful use of force upon a peace officer, however slight, coupled with *actual* knowledge the victim is a peace officer in the performance of his or her duties, is clearly a crime of moral turpitude and demonstrates a readiness to do evil." (*Lindsay*, *supra*, 209 Cal.App.3d at p. 857.) Taken together, *Mansfied* and *Lindsay* support the conclusion that the infliction of injury is not determinative of whether a crime is a crime of moral

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704 F.3d 1205, 1211, disapproved on another ground in *Ceron v. Holder* (2014) 747 F. 3d 773, 782, fn. 2.) That is so because the moral turpitude designation plays different roles under the INA and California law. (*Ibid.*) For that reason, perhaps, neither *Morales-Garcia* nor *Galeana-Mendoza* mentioned this court's decision in *Rodriguez*, despite its seeming applicability. (See also *Latter-Singh v. Holder* (2012) 668 F.3d 1156, 1163, fn. 4 [California moral turpitude designation not of great weight in determining moral turpitude under INA].)

turpitude; rather, it is "the fact of the relationship" between the parties and the defendant's exploitation thereof that shows a " 'readiness to do evil[.]' " (*Castro*, *supra*, 38 Cal.3d at p. 314.)

Since domestic battery is a crime involving moral turpitude, defense counsel was not ineffective when she failed to argue otherwise in the trial court. "It is well settled that counsel is not ineffective in failing to make an objection when the objection would have likely been overruled by the trial court." (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 924, citing *People v. Osband* (1996) 13 Cal.4th 622, 678 (*Osband*).) Thus, appellant's claim that his counsel was ineffective in not objecting to the admission of evidence of his domestic battery conviction on the ground that it is not a crime of moral turpitude fails.

Evidence Code Section 352 Objection

As noted, defense counsel moved in limine to exclude reference to "any prior conviction[s] which the defendant has suffered." Defense counsel argued that if her client testified, his prior "conviction" should be excluded under Evidence Code section 352.

Assuming for the sake of argument that this blanket assertion is enough to preserve appellant's claim that the trial court abused its discretion under Evidence Code section 352 in admitting evidence of his prior misdemeanor convictions, we find it to be without merit.

"Under *Castro* the trial courts have broad discretion to admit or exclude prior convictions for impeachment purposes, and must exercise that discretion on motion of the defendant. The discretion is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded." (*People v. Collins* (1986) 42 Cal.3d 378, 389.)

"When exercising its discretion under Evidence Code section 352, a court must always take into account, as applicable, those factors traditionally deemed pertinent in this area. [Citations.]" (*Wheeler, supra,* 4 Cal.4th at p. 296.)

"In general, a misdemeanor—or any other conduct not amounting to a felony—is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Wheeler, supra,* at pp. 296-297.)

"When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 931 (*Clark*).)

On the record before us as set forth *ante,* it cannot be denied that the court carefully exercised its discretion and indulged in the weighing process under Evidence Code section 352. In this case, the trial court consciously exercised its discretion under Evidence Code section 352, and it did so soundly. The court concluded that appellant's relatively recent convictions for domestic battery and criminal threats,[7] both offenses involving moral turpitude, were highly relevant to appellant's credibility.

[7] Making a criminal threat is a crime of moral turpitude. (*People v. Thornton* (1992) 3 Cal.App.4th 419, 424.)

Appellant disagrees with some of the court's conclusions. In particular, he disagrees with the court's conclusion that the convictions were not remote and the court's conclusion that the convictions were not similar to his current conviction.

Appellant argues that because of his young age, "a relatively high percentage of his life" had elapsed since he committed the domestic battery and criminal threats offenses in 2011, and the convictions were, therefore, "reasonably remote." Appellant fails to cite any authority for this proposition. In fact, numerous courts have found such a time span "does not point toward exclusion of the evidence." (*People v. Lassell* (1980) 108 Cal.App.3d 720, 725 [prior crime was committed three years before alleged offense and four years before trial]; see also *People v. James* (1978) 88 Cal.App.3d 150, 157 [five-year-old prior]; *People v. Boothe* (1977) 65 Cal.App.3d 685, 688 [six-year-old prior].) Most notably, in *People v. Carter* (2014) 227 Cal.App.4th 322, the Court of Appeal found that it "was not unreasonable and within [the court's] discretion" (*id.* at p. 330) to admit two defense witnesses' 11-year-old convictions even though the witnesses were only 19 and 20 years old when they committed the prior crimes. (*Id.* at pp. 329-330.) In this case, appellant's prior convictions occurred just over two years before he first had sex with Jane in 2013, and just over three years before his trial. As such, we reject his argument that his convictions were too remote.

Next, appellant argues that the court was wrong to conclude that his prior convictions did not involve conduct similar to the charged offense. According to appellant, the crimes were all similar in that he "took advantage of a female." This unsubstantiated assertion is insufficient to establish an abuse of discretion. Appellant draws no factual comparisons between the crimes. Indeed he cannot, because the facts of the prior convictions were not discussed below or admitted into evidence. On their face, the crimes of criminal threats, domestic battery, and statutory rape are not so similar that the trial court's ruling "falls outside the bounds of reason." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226 [court's evidentiary ruling will be sustained on review unless it falls

outside the bounds of reason]; *Osband*, *supra*, 13 Cal.4th at p. 666 [a court abuses its discretion when its ruling falls outside the bounds of reason].) More importantly, the trial court was not required to exclude the prior convictions because they were "too similar" to the current charge. (*Clark*, *supra*, 52 Cal.4th at p. 932 [although similarity between the prior conviction and charged offense is a factor for the court to consider, it is not dispositive].)

Although appellant contends that his prior convictions "showed a disposition for violence against women", he fails to demonstrate that they were emotionally inflammatory such that their admission compromised the jury's ability to remain impartial. (See *People v. Doolin* (2009) 45 Cal.4th 390, 439 [evidence should be excluded under Evidence Code section 352 when it is of such nature as to inflame the emotions of the jury]; *People v. Branch* (2001) 91 Cal.App.4th 274, 286 (*Branch*) [same].) Moreover, the fact that the convictions were admitted instead of their underlying facts reduces the prejudicial impact of the evidence (if any) by "ensuring that the jury would not be tempted to convict [appellant] simply to punish him for the other offenses." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917 [discussing propensity evidence]; see also *Branch*, *supra*, at p. 284 [if the prior offense did not result in a conviction, that fact increases the danger that the jury may wish to punish the defendant for the uncharged offenses].) Finally, appellant acknowledges that the court's ruling did not deter him from testifying, despite his alleged concern that "the general population views [domestic battery] as egregious."

In sum, after giving due consideration to the appropriate factors, the trial court properly exercised its discretion to admit appellant's prior crimes of moral turpitude. We find no abuse of discretion under Evidence Code section 352.

Registration under Section 290

Section 290, subdivision (b) provides, "Every person described in subdivision (c) for the rest of his or her life while residing in California . . . shall be required to register

with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall be required to register thereafter in accordance with the Act." In turn, subdivision (c) of section 290, provides, "The following persons shall be required to register: [¶] Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 288, 288a, or 289, Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, subdivision (b) and (c) of Section 236.1, Section 243.4, paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses."

As can be seen, section 261.5, unlawful sexual intercourse with a minor, is not an offense enumerated in section 290, subdivision (c), and a person convicted of that offense

is not subject to a mandatory lifetime registration obligation under section 290, subdivision (b). However, section 290.006 provides, "Any person ordered by any court to register pursuant to the Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration." Thus, the Sex Offender Registration Act (§ 290 et seq.) "allows for *discretionary* sex offender registration for those convicted of unlawful sexual intercourse with a minor (§§ 261.5, 290.006)." (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 874 (*Johnson*).)

In this case, the court found that appellant's "crime was committed for the purpose of sexual gratification." Although the court went on to state that it "would not automatically order registration in a case like this," and acknowledged that it was ordering "discretionary rather than mandatory" registration, the court felt there was "a need to protect the public" and so accordingly, the court ordered appellant to register "pursuant to section 290 and 290.006." The court noted that there was a lifetime registration requirement but decided to reserve jurisdiction to modify its order "when [appellant's] attorney brings that to the court." The court went on to say, "I certainly will consider that in the future and I'll consider that after a period of time when you've successfully performed on probation." The court advised appellant that failure to register was a new crime and would violate the terms of his probation.

If a court imposes a discretionary registration requirement upon a person convicted of violating section 261.5, it must comply with the requirements set forth in section 290, subdivision (b). (See *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197, overruled on other grounds in *Johnson*, *supra*, 60 Cal.4th 871.) Registration under section 290 and 290.006 is for life. Under section 290.006, a trial court may order a person convicted of unlawful sexual intercourse with a minor to register "pursuant to the

Act." "By its terms, section 290 imposes a registration requirement on the individual 'for the rest of his or her life.' " (*People v. King* (2007) 151 Cal.App.4th 1304, 1308 (*King*).)

Since appellant was "ordered to register . . . pursuant to section 290 and 290.006" his registration is for life. Nevertheless, during the sentencing hearing, the court indicated it would reconsider its order requiring appellant to register as a sex offender depending on his progress on probation. The court stated at one point, "I don't intend to have you register for the rest of your life." This was not permitted under section 290. A trial court may not impose temporary registration under the registration statutes, which, as noted, mandate lifetime registration. (See §§ 290, subd. (b), 290.006.) Further, the plain language of the statute "does not allow the court to sentence a defendant and then defer the registration decision." (*People v. Allexy* (2012) 204 Cal.App.4th 1358, 1363 (*Allexy*).) Nor does it allow the court to impose lifetime registration and then remove the order at a later date. Plainly, the court misunderstood its authority and mistakenly attempted to impose temporary registration pursuant to the statutes. As such, we must remand this case to afford the court an opportunity to reconsider its order.

For the guidance of the trial court on remand we make the following observation. Despite appellant's argument to the contrary, the court made sufficient factual findings to support an order for lifetime registration. Explicitly, as noted, it found that appellant had committed the crimes for "purposes of sexual gratification[.]" Further, the court stated its concerns "for public safety" and had "serious concerns that something like this could happen again in the future[.]" (See *People v. Lewis* (2008) 169 Cal.App.4th 70, 78 [one reason for requiring registration under § 290.006 must be that defendant is likely to commit a similar offense in the future].)[8] Thus, on remand, the court may properly find that lifetime registration under section 290.006 is appropriate in appellant's case.

[8] The court's findings are supported by the record. The court observed that appellant exploited a particularly vulnerable victim and displayed a lack of remorse. (continued)

However, as an alternative to imposing lifetime registration at the outset, the court has the authority to defer such an order.[9] If a trial court wants to use the specter of sex offender registration as a basis for encouraging him to comply with the terms of probation, there is a way to do so without violating section 290.006. "A trial court may suspend imposition of sentence and place a defendant on probation (see § 1203.1, subd. (a)), thereby leaving any decision to impose sex offender registration to the time defendant is sentenced." (*Allexy*, *supra*, 204 Cal.App.4th at p. 1363.)

In sum, the trial court made—and articulated—appropriate findings to support a discretionary order under section 290.006. However, it mistakenly believed it had authority to rescind the order. Given the court's statements at sentencing, we are not

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Specifically, the court noted that Jane was "like a seven-year[-]old mentally." Further, the court noted that appellant had "smirked" at the court. In a letter to the court appellant failed to acknowledge the crimes or show any remorse. Moreover, a letter from appellant's employer indicated that at times his job required that he be around young girls.

[9] The People suggest that the court could order temporary sex offender registration as a term of appellant's probation made outside of the requirements of the Sex Offender Registration Act. We have not found any reported decisions *specifically* holding that such an order is permissible. Although the People cite *King*, *supra*, 151 Cal.App.4th 1304, we believe that a close reading of that case as supporting temporary sex offender registration as a probation condition is dictum. Moreover, given the lifetime nature of registration as mandated by section 290, subdivision (b), and because we question whether the state's tracking system for sex offender registrants can accommodate temporary registration (see http://meganslaw.ca.gov/sexreg.htm [describing Department of Justice's Sex Offender Tracking Program and the "lifetime sex offender registration requirement" of California statutes]), we doubt that temporary sex offender registration may be ordered as a term of probation under the present statutory scheme. Although a trial court has broad discretion to impose conditions of probation that will foster rehabilitation of the defendant and protect the public and the victim (*People v. Jungers* (2005) 127 Cal.App.4th 698, 702), we have serious questions as to how temporary sex offender registration would work. Nevertheless, since we have concluded that the court had no authority under the statutes to order modifiable sex offender registration, we need not decide the interesting, problematic question raised by the People as to the validity of a temporary registration order as a term of probation.

convinced that the court would have imposed the registration requirement had it understood the limitations on its authority under the statutes. Accordingly, we remand this case to the trial court so that it can properly exercise its discretion as explained above.

Disposition

The order of probation is reversed. The matter is remanded with directions to reconsider the sex offender registration requirement.

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ELIA, ACTING P.J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.